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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~1076~~ 181

IN THE MATTER OF THE APPLICATION

of

FOUR MAPLE DRIVE REALTY CORP.,

Petitioner,

for an order pursuant to Article 78 of the Civil Practice Act against Charles Abrams, State Rent Administrator,

Respondent,

HAROLD KELLY and 74 other tenants similarly situated,

Intervenor-Respondents.

Appeal From the Court of Appeals of the State of New York

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

Appellant, Four Maple Drive Realty Corp. submits herewith its statement particularly disclosing the basis upon which this court has jurisdiction on appeal to review the order of the Court of Appeals of the State of New York, dismissing the appeal of the appellant therein, and the order of the Appellate Division of the Supreme Court of the State of New York, Second Department which held

that Chapter 141, Section 3 of the Laws of 1954, as applied did not deprive appellant of the equal protection of the law or due process of law.

1. (a) The sole reported opinion in this case is the opinion of the Appellate Division of the Supreme Court, Second Department, 2 A. D. 2nd 753; 153 N.Y.S. 2nd 747.

(b) (i) This is a proceeding brought pursuant to Article 78, Sec. 1283, *et seq.*, of the New York Civil Practice Act for a review of the order of the State Rent Administrator denying to petitioner an increase in rent for which it had applied pursuant to Chapter 278 of the Laws of 1946, re-enacted by Chapter 685 of the Laws of 1955 of the State of New York.

(ii) This is an appeal from the final order of the Court of Appeals of the State of New York dismissing the appeal as a matter of right of the appellant herein on motion of the respondent herein on the grounds that there was not involved a substantial question as to the construction of the Constitution of the United States, which order of dismissal was entered in this action on the 17th day of January, 1957. The Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the Court of Appeals of the State of New York and in the Supreme Court, State of New York, County of Nassau, on the 12th day of April, 1957.

(iii) The jurisdiction of the Supreme Court of the United States on appeal is conferred by 28 U.S.C. 1257-2. Appellant challenges the validity of the order of Temporary State Housing Commission which denied to appellant an increase in rent on the basis of Chapter 141, Section 3 of the Laws of 1954 of the State of New York, a "Statute of a State" within the meaning of 28 U.S.C. 1257-2 on the ground that as applied to appellant it is

repugnant to the constitution of the United States and the decision of the highest court of the state was in favor of its validity.

(iv) The cases which sustain the jurisdiction of the Supreme Court of the United States are as follows:

Dahnke-Walker Milling Company v. *Bondurant* (1921), U. S. 282, 42 S. Ct. 106; *Dept. of Bank* v. *Pink* (1942), 317 U. S. 264; 63 S. Ct. 233; *Andres* v. *Virginia Railway Company* (1919), 248 N. Y. 272, 39 S. Ct. 101; *Richfield Oil Corporation* v. *State Board of Equalization* (1946), 329 U. S. 69; 67 S. Ct. 156.

(v) This appeal involves the validity of Chapter 141, Section 3 of the Laws of 1954 of the State of New York, which reads:

> "Notwithstanding the provisions of any general, special or local law, for the purposes of subdivision four of section four of chapter two hundred seventy-four of the laws of nineteen hundred forty-six, as amended, constituting the emergency housing rent control law, the ratio which the assessed valuation bears to the full valuation shall be computed by using the equalization rate established by the state board of equalization and assessment for use in placing special franchise assessments on assessment rolls completed in *nineteen hundred fifty-three.*" (emphasis added)

and which must be read in conjunction with Chapter 684, Section 4(a)(1) of the Laws of 1955, which reads:

> "The commission may from time to time adopt, promulgate, amend or rescind such rules, regulations and orders as it may deem necessary or proper to effectuate the purposes of this act, including practices relating to recovery of possession; provided that such regulations can be put into effect without general

uncertainty, dislocation and hardship inconsistent with the purposes of this act; and provided further that such regulations shall be designed to maintain a system of rent controls at levels which, in the judgment of the commission are generally fair and equitable and which will provide for an orderly transition from and termination of emergency controls without undue dislocations, inflationary price rises or disruption. Provision shall be made pursuant to regulations prescribed by the commission, for individual adjustment of maximum rents where

(1) the rental income from a property yields a net annual return of less than six per centum of the valuation of the property. Such valuation shall be the current assessed valuation established by a city or town, which is in effect at the time of the filing of the application for an adjustment under this subparagraph properly adjusted by applying thereto the ratio which such assessed valuation bears to the full valuation as determined by the state board of equalization and assessment. * * *"

(c) The following questions are presented by this appeal:

(a) Whether Section 3 of Chapter 141 of the Laws of 1954, McKinney's Unconsolidated Laws 1956 supplement (p. 139) as construed and applied to the appellants herein is repugnant and contrary to the Due Process Clause, and the Equal Protection Clause of the 14th Amendment to the Constitution of the United States in that it is discriminatory as to the appellant, and creates a classification which is arbitrary and without any reasonable basis.

(b) Whether as applied to the appellant herein the decision of the State Rent Administrator construing Section 4(a)(1) of Chapter 685 of the Laws of

1955 as having to be read and applied in conjunction with Section 3 of Chapter 141 of the Laws of 1954, which in effect is discriminating and hence contrary and repugnant to the Due Process Clause and the Equal Protection Clause of the 14th Amendment to the Constitution of the United States, and deprives appellant of the equal protection and due process of law therein guaranteed.

Statement

This proceeding was brought under Article 78 of the Civil Practice Act of the State of New York for an order reviewing and annulling the action of the New York State Rent Administrator in denying the application of the petitioner for an increase in rent under Section 4, Subdivision 4-a-1 of Chapter 685 of the Laws of 1955 of the State of New York.

The petitioner is the owner of certain real property located in the Incorporated Village of Great Neck Plaza, County of Nassau, State of New York, the post office address of which is 4 Maple Drive, Great Neck.

The petitioner filed an application with the Local Rent Administrator pursuant to Section 33- (5) of the Rent and Eviction Regulations requesting an increase in the rent of the apartment house known as 4 Maple Drive. On July 29, 1955, the Local Rent Administrator issued an order dismissing the application on the ground that petitioner failed to qualify under the regulations.

In September 1955 the Landlord filed two protests to this order, one addressed to the action of the Administrator in denying the application and the other addressed to the adoption of the regulations as being unauthorized by any statute or law of the State of New York, or if authorized, protesting the constitutionality of such a regulation. By orders, dated November 3, 1955, and November 22, 1955, the State Rent Administrator denied the peti-

tioner's protest. A copy of the opinions of the State Rent Administrator are attached hereto (Exhibits B and C).

In January 1956, the petitioner commenced a proceeding in accordance with Article 78 of the Civil Practice Act requesting that the orders of the said Rent Administrator dated November 3, 1955 and November 22, 1955, be annulled, and directing the State Rent Administrator to grant petitioner's application for an increase of maximum rent.

The matter came on before the Hon. Cortland A. Johnson, in the Supreme Court, Nassau County, New York on March 7, 1956, and on March 21, 1956 the Court handed down its decision dismissing the petition. An order was entered thereon on April 18th, 1956. A copy of Judge Johnson's opinion is attached hereto (Exhibit D).

On May 28, 1956, the petitioner brought an appeal before the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, from the order entered in Supreme Court, Nassau County, dismissing the petition, and on July 2, 1956, an order was entered in the Office of the Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, unanimously affirming the order of the said Supreme Court. The decision of the Appellate Division stated that the constitutional question was properly raised in this proceeding, but held that petitioner had not shown that the regulation of the Rent Commissioner was unconstitutional. A copy of the opinion of the Appellate Division is attached hereto (Exhibit F).

Petitioner served upon the respondents on August 9, 1956, a Notice of Appeal on the constitutional question pursuant to Section 586 of the Civil Practice Act of the State of New York.

On July 18, 1956, the petitioner brought on a motion before the Appellate Division, Second Department, for an

order granting to the petitioner, leave to appeal to the Court of Appeals from the order of the Appellate Division, on the grounds that there are involved in the action, questions of law which, in the interests of substantial justice should be reviewed by the Court of Appeals.

On July 23, 1956, an order was made and entered without opinion in the Clerk's Office of said Appellate Division, denying this motion of the petitioner. Petitioner received a copy of this order on September 18, 1956.

Petitioner then made a motion in the Court of Appeals of the State of New York for leave to appeal on the non-constitutional issues which was denied by order dated November 15, 1956.

Thereupon respondents brought on a motion in the Court of Appeals to dismiss petitioner's appeal as of right on the grounds there was not involved a substantial question as to the construction of the Constitution of New York or of the United States.

This motion was granted by order dated January 17, 1957.

The constitutional issue was first raised by petitioner in its protest to the State Rent Administrator protesting the denial of its application for an increase in rent.

The Administrator failed to mention the constitutional issue in his order and opinion denying said protests. The issue was next raised in the New York State Supreme Court in the petitioner's petition therein, Paragraph "Eleventh".

Justice Cortland A. Johnson in his opinion dated March 21, 1956, dismissing the petition said that the argument as to unconstitutionality was not one that could be considered in this proceeding.

Petitioner next raised the constitutional question on its appeal to the Appellate Division of the Supreme Court of the State of New York for the Second Department.

Petitioner in Point II of its brief in the Appellate Division, pages 15, *et seq.*, set forth the argument that the statute denied the petitioner the equal protection of the law and due process of law under the Fourteenth Amendment of the Constitution of the United States.

The Appellate Division in affirming the decision of Mr. Justice Johnson said in its opinion (2 A. D. 2nd 753, 153 N. Y. Supp. 2nd 747, 751):

> "In our opinion, Section 3 of chapter 141 of the Laws of 1954 and the regulation adopted pursuant thereto are valid and constitutional. The mere fact that legislation does not affect all areas uniformly does not render it unconstitutional, Farrington v. Pickney, 1 N. Y. 2d 74, 150 N.Y.S. 2d 585.
>
> "With the issue of unconstitutionality squarely raised in the protest and in the petition, the court may consider this article 78 proceeding as one in the nature of mandamus, or as including a proceeding in such nature, to direct the State Rent Administrator to disregard an alleged unconstitutional statute and regulation and grant the relief to which the petitioner would be entitled if they were unconstitutional * * *"

Following this decision of the Appellate Division holding that the constitutional issue was properly raised in the protest and in the Supreme Court and further holding that the statute was constitutional, petitioner served a notice of appeal to the Court of Appeals of the State of New York as a matter of right on the grounds that there was directly involved the construction of the Constitution of the United States.

By notice of motion dated December 11, 1956, respondent moved in the Court of Appeals to dismiss the aforesaid appeal on the grounds that there was not directly or necessarily involved any substantial question as to the construction of the Constitution of the United States. This motion was granted.

The Federal Questions Are Substantial

The question which is sought to be put before this court is whether Chapter 141, Section 3 of the Laws of 1954 of the State of New York as applied to the appellant herein was arbitrary, capricious and denied the appellant of the equal protection and due process of law.

Chapter 685, Section 4(a)(1) of the Laws of 1955 of the State of New York states that a petitioner shall be entitled to an increase in maximum rent where

> "the rental income from a property yields a net annual return of less than six per centum of the valuation of the property. Such valuation shall be the current assessed valuation established by a city or town which is in effect at the time of the filing of the application for an adjustment under this subparagraph properly adjusted by applying thereto the ratio which said assessed valuation bears to the full valuation as determined by the State board of equalization and assessment * * *"

The equalization ratio referred to is a legislative device to correct inequalities since local assesed valuations do not necessarily coincide with true valuation of real property and since they vary from county to county. The true valuation of property became important under statutes providing for school aid, highway aid and the like.

The equalization ratio for Nassau County in the year 1955, when appellant's petition was made, was 49%. How-

ever, the State Rent Commission held that they could not, under Chapter 141, Section 3 of the Laws of 1954, use that ratio, but, must apply the ratio established in the year 1953 which was 100%.

The equalization ratio is used to reflect the bearing which assessed valuation has to the true valuation of property.

Between 1953 and 1954 the State Board of Equalization and Assessment reviewed their determination of the proper equalization ratios throughout the state in order that the true valuation of property might be determined from the assessed valuation.

In reviewing the equalization ratios promulgated in 1954 and those promulgated in 1953 it is readily seen that the equalization ratios set out for some counties more closely reflected true valuation than those set out for other counties.

These errors were corrected by the revised ratios determined in 1954.

County	*1953 ratio*	*1954 ratio*
Nassau	100%	49%
New York ...	100%	99%
Queens	100%	75%
Bronx	100%	96%
Kings	100%	86%

Therefore property owners in New York or Queens County received a return on the value of their property which was closer to the 6% return allowed by Chapter 685, Section 4(a)(1) of the Laws of 1954, than did appellant in Nassau County.

By freezing the equalization factor to the 1953 ratios the legislature created a classification which was both arbitrary and unreasonable and which had no basis since

it was determined by the State Board of Equalization and Assessment that those 1953 ratios were incorrect in that they did not reflect the true valuation.

The aforesaid arbitrary classification resulted in some property owners realizing a greater return on their investments merely as a result of their being situate in different counties in the state and because of the incorrect equalization ratios which were being employed.

Hence appellant was denied the equal protection of the laws and the due process of law guaranteed by the 14th amendment to the Constitution of the United States.

In the case of *Connelly & Dee* v. *Union Sewer Pipe Co.*, 184 U. S. 540, an act which exempted agriculturists or live stock dealers from provisions prohibiting combinations and restraint of trade was held unconstitutional as discriminatory and unequal protection of the laws. *Matter of Pell*, 171 N. Y. 48 at page 57, quoted from the *Connelly* case, 184 U. S. 540, with approval:

> " 'The difficulty is not met by saying that generally speaking, the state when enacting laws may in its discretion make a classification of persons, firms, corporations and associations in order to subserve public objects, for this Court has held that classification must always rest upon some difference which bears a reasonable and just relation to the acts in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * 1. no duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure equality of rights which is the foundation of free government. * * *,' "

To the same effect is *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79 and *People* v. *Orange County Road Construction Co.*, 175 N. Y. 84.

In continuing to apply Section 3 of Chapter 141 after the standards set forth therein were abandoned as unrealistic, the Administrator is using the statute to obtain unequal and discriminatory results. In *People* v. *Macello*, 25 N. Y. Sub. 2nd 533, an act required trucks or vehicles carrying anthracite coal into New York City from a point more than five miles beyond the City limits to carry certificates showing the origination of such coal. The Court held the law was unconstitutional as it discriminated among different types of carriers and that there was no sound basis or rationality behind the law. The continuation of the 1953 equalization rates for purposes of rent increases demonstrates how unfair such a law is when it is a fact that the rates have been changed for purposes such as education in order to equitably apportion state aid.

As to the reasonability of the standard a question might be asked: Are the conditions which exist in New York City, only a short distance from the subject premises so divergent as to warrant such a drastic difference in the result when the rent increase formula is applied? No such divergent conditions reasonably could be said to exist. The flow of commerce between the two localities has erased any economic differences that might be said to exist, other than the mere boundaries themselves. Nor has the Legislature avowed any purpose for the enactment of Section 3, Chapter 141 of the Laws of 1954. In *People* v. *Wilber*, 198 N. Y. 1, the Court had before it a law requiring the licensing of dancing studios under the direction of a teacher. The Court held the act unconstitional and at page 11 stated:

> "The discrimination is based upon a ground that is without reason. There is nothing in the fact of teaching dancing as distinguished from dancing without a teacher that has any injurious effect upon the relation to the morals, health, and good order of the community. A discrimination that is made in the exercise of the police power must be based upon some reason.

In the case of *New York Sanitary Utilization Co.* v. *The Public Health Department*, 32 Misc. 577, affirmed in 61 Appl. Div. 106, the Court declared unconstitutional an act which prohibited the maintenance of garbage disposal plants in the County of Brooklyn. The Court held that the act was discriminatory in that it permitted the maintenance of garbage disposal units in the other counties and Boroughs of the City of New York while prohibiting such maintenance in the Borough of Brooklyn.

The constitutional issue has been raised at every stage of these proceedings.

The Appellate Division of the Supreme Court of the State of New York held that these questions were properly raised in these proceedings and the state courts upheld the constitutionality of the statute in question.

There is no further action which may be taken in the New York courts and hence this appeal to the Supreme Court of the United States is proper. *Dahnke-Walker Milling Company* v. *Bondurant* (1921), U. S. 282, 42 S. Ct. 106; *Dept. of Banking* v. *Pink* (1942), 317 U. S. 264, 63 S. Ct. 233; *Andrews* v. *Virginia Railway Company* (1919), 248 U. S. 272, 39 S. Ct. 101; *Richfield Oil Corporation* v. *State Board of Equalization* (1946), 329 U. S. 69, 67 S. Ct. 156.

The unfairness of Chapter 141, Section 3, Laws of 1954, was recognized by Governor Averell Harriman, who recommended to the state legislature, in his 1957 message on the State Rent Law, that the section be repealed.

> "Fair return cases generally are processed on the basis of assessed valuation, as adjusted by application of State Board of Equalization and Assessment rates for the locality where the property is situated. Chapter 141 of the Laws of 1954 specified that the 1953 equalization rates be used for this purpose. In 1954, the Board issued new rates, more accurately re-

flecting ratios between true value and assessed value. The Board at that time also computed rates for types of structures in a great many communities within the State.

It is the Commission's opinion that the rates fixed in 1954 are the most equitable factor available in establishing valuation for the purpose of computing a fair return. Use of 1954 rates will benefit owners of small structures particularly. This can be illustrated by presenting the Commission's findings for a given community. The City of Yonkers, for example, had over-all equalization rates of 100 per cent in 1953 and 72 per cent for the year 1954. The rate for apartment houses in 1954 was 83 per cent, while smaller houses of from one to three dwelling units had a rate of only 58 per cent. Clearly utilization of an overall rate imposes a disadvantage upon the owners of small structures, many of whom are non-professional operators. By using equalization rates for types of buildings, the equalized assessed valuation for all structures will more nearly approximate the present market value of the property. I therefore recommend that Section 3 of Chapter 141 of the Laws of 1954 be repealed and the Rent Control Law be amended so as to permit use of the 1954 equalization rates; and to provide that where information is available computing different ratios for various types of structures within a locality, the Commission may use such applicable ratios in computing the equalized assessed valuation of the property." (Special message to the Legislature by Governor Averell Harriman delivered on January 23, 1957.)

Subsequently on April 20, 1957, with the approval of the Governor, Chapter 755 of the Laws of 1957 became law. This section, in part, repealed Chapter 141, Section 3, Laws of 1954. This, however, does not make the questions raised herein moot.

Under Chapter 755 of the Laws of 1957 appellant is entitled to a 15% rent increase.

If Chapter 141, Section 3 of the Laws of 1954 is declared unconstitutional as it denies appellant the equal protection of law and due process of law, then appellant's right to a rental increase will revert back to the first petition therefor in 1955 and appellant will be entitled to a 15% increase for each of the years 1955, 1956 and 1957, or a total increase at this time of almost 50%.

Conclusion

Appellant respectfully suggests that this appeal brings before this court federal questions under the constitution that are far-reaching and important both in terms of legal principles and of practical import upon property owners throughout New York State and that enough has been said to demonstrate that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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Attorneys for Petitioner,
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New Hyde Park, New York.

Appendix

Exhibit A

AO 826
ihk
Docket No.

STATE OF NEW YORK
TEMPORARY STATE HOUSING RENT COMMISSION

ORDER DENYING APPLICATION OR TERMINATING PROCEEDING

Address of housing accommodations: 4 Maple Drive, Great Neck, N. Y.

Mailing Address of Landlord: Name: Four Maple Drive Realty Corp., c/o Bernstein, Margolin & Balin, Esqs. Number and Street: 1510 Jericho Tpke. City, Zone No. and State: New Hyde Park, N. Y.

Mailing Address of Tenant: Name: All tenants. Number and Street: 4 Maple Drive. City, Zone No. and State: Great Neck, N. Y.

The Local Rent Administrator:

1. xx After consideration of all the evidence in this matter, finds that the facts in your case do not warrant the relief requested under Section(s) 33-5 of the Regulations. Therefore, it is ordered that said application be, and it hereby is denied, without prejudice to the filing of another application if other facts can be shown which warrant the relief under the Regulations.

2. After further consideration of the evidence in the record, finds that the maximum rent should not

Exhibit A.

be adjusted as proposed in the notice sent to you on ..... Therefore, it is ordered that the proceeding be, and it hereby is terminated, and the maximum rent remains at $..... ..... per .....

3. xx Other) Failure to qualify.

To all tenants with the exception of L-1, Dr. Jack Cohen which is decontrolled.

Issued and Effective Jul 29 1955

THOS. E. HEFFNER
Local Rent Administrator

Exhibit B

STATE OF NEW YORK
TEMPORARY STATE HOUSING RENT COMMISSION
280 Broadway
New York 7, New York

Protest Docket No. PLAO-867

L.R.O. Docket No. AO-826-925

In the Matter of the Protest of

FOUR MAPLE DRVE REALTY CORP.,

Applicant.

ORDER AND OPINION DENYING PROTEST

On August 24, 1955 the above-named applicant-landlord filed a Protest against order(s) issued on July 29, 1955 by the Local Rent Administrator of the Hempstead Local Rent Office, concerning the housing accommodations known as 4 Maple Drive, Great Neck, N. Y., Various apartments.

The order(s) (were) issued pursuant to Section 33(5) of the Regulations, which provides:

"Section 33. Grounds for increase of maximum rent. * * * Any landlord may file an application to increase the maximum rent otherwise allowable, on forms prescribed by the Administrator, only on one or more of the following grounds:

5. Net annual return.

a. The net rental income from a property yields a net annual return of less than six percent of the

valuation of the property, as hereinafter defined. Such valuation shall be the current assessed valuation established by a city or town, which is in effect at the time of the filing of the application for an adjustment under this paragraph, properly adjusted by applying thereto the ratio which such assessed valuation bears to the full valuation as determined by the State Board of Equalization and Assessment for use in placing special franchise assessments on assessment rolls completed in 1953. Where, however, the assessed valuation of the land exceeds four times the assessed valuation of the buildings thereon, the Administrator may determine a valuation of the property equal to five times the equalized assessed valuation of the buildings, for the purposes of this paragraph.

The Administrator may make a determination that the valuation of the property for the purposes of this paragraph is an amount different from such equalized assessed valuation where there is a request for a reduction in such assessed valuation currently pending; or where there has been a reduction in the assessed valuation for the year next preceding the effective date of the current assessed valuation in effect at the time of the filing of the application; or where there has been a bona fide sale of the property within the period between March 15, 1951 and the time of filing the application.

b. For the purposes of this paragraph the following terms shall mean and include:

"Property." Any structure or group of structures including the land containing housing accommodations having common facilities and operated as a single enterprise.

Exhibit B.

"Net Annual Return." The amount by which the earned income exceeds the operating expenses of the property.

"Earned Income." The current maximum rents on an annual basis from all controlled housing accommodations; the current rents on an annual basis from all decontrolled and uncontrolled housing accommodations, commercial and business space, and other rented or rentable space; any other income earned from the operation of the property. Where a housing accommodation without a maximum rent is vacant or is occupied without payment of any rent or with payment of a partial rent, the rent generally prevailing for substantially similar controlled housing accommodations shall be deemed the rent for the purposes of the application. Where commercial or business or other rentable space is vacant or is occupied without payment of any rent or with payment of a partial rent, the rent generally prevailing for substantially similar space shall be deemed the rent for the purposes of the application. Where the Administrator finds in considering an application under this paragraph that a present tenant is paying a rent less than the maximum rent, the Administrator, upon request of the landlord, may reduce the maximum rent of the housing accommodation to the amount actually being paid, or to the highest maximum rent for comparable controlled housing accommodations in the structure, whichever is higher.

"Operating Expenses." All operating expenses necessary in the operation and maintenance of the property and properly allocable to the test year, excluding mortgage interest and amortization, but including an allowance for depreciation of two percent

of the valuation of the buildings, exclusive of the land, as defined in paragraph 5(a), or the amount shown for depreciation of the buildings in the latest required Federal income tax return, whichever is lower; provided, however, that no allowance for depreciation of the buildings shall be included where the buildings have been fully depreciated for Federal income tax purposes or on the books of the owner. Increases or decreases in real estate taxes, water or sewage charges and wages currently in effect may be projected in computing operating expenses.

"Test Year." The most recent full calendar year or fiscal year, or any twelve consecutive months ending not more than ninety days prior to the filing of the application.

c. If, as determined by the Administrator, a property is earning a net annual return of less than six percent of the equalized assessed valuation of the property, the Administrator shall grant an adjustment in the maximum rents.

d. No adjustment for any individual housing accommodation shall exceed 15 percent of the maximum rent prescribed on the date the order is issued under this paragraph; provided, however, that the Administrator may waive this limitation where a greater increase is necessary to make the earned income of the property equal to its operating expenses.

e. No further application may be filed under this paragraph sooner than one year from the date of filing a prior application under this paragraph if an increase had previously been granted thereunder, to establish a net annual return of six percent of the equalized assessed valuation of the property. No

order increasing a maximum rent shall be issued on a subsequent application until one year from the date of the issuance of the order granting an increase hereunder. The Administrator may waive these limitations where the property has been affected by a significant increase in operating costs which applied to a substantial segment of housing accommodations in the community."

The Administrator has carefully reviewed all the evidence in the record and has considered this matter de novo.

The issue presented by this protest is: Whether the Local Rent Administrator properly denied the landlord's application on the ground that the landlord failed to qualify, for an increase in the maximum rent of the subject housing accommodations under Section 33(5) of the Regulations.

The landlord filed applications for an increase in the maximum rents of the subject apartments pursuant to the provisions of Section 33(5) of the Regulations.

The tenants objected, raising financial issues and alleging that the landlord was not maintaining services.

The Local Rent Administrator caused an audit to be made of the landlord's application, which disclosed that there were two apparent adjustments to be made immediately which would result in the issuance of denial orders based solely upon the landlord's claimed but unsubstantiated expenses. For this reason the landlord was not requested to submit any evidence.

The apparent adjustments are as follows:

The landlord equalized the assessed valuation at 49%; however the equalization rate for all of Nassau County used in determining a landlord's eligibility for the pur-

poses of Section 33(5), is 00%. The landlord computed a 6% net return on an equalized assessed valuation of $677,755.51, which amounted to $40,665.33, as a net return allowed. This was corrected by computing 6% of $332,100.00, resulting in a net return of $19,926.00.

The landlord also used the erroneous equalization rate in computing the depreciation. The audit disclosed that the application should be denied solely on the face value of the application regardless of any other adjustments which might be necessary.

On July 29, 1955, the Local Rent Administrator issued orders denying the landlord's applications on the ground that it failed to qualify for an increase under Section 33(5).

A protest was filed to the above orders on the ground that the Local Rent Administrator should have applied the present equalized assessed valuation rate of 49% as established for the Great Neck area in 1954. The landlord alleged that the regulation requiring the use of the equalized assessment rate for 1953 is illegal, since it is based upon Section 3, Chapter 41, Laws of 1954. The landlord urges that these laws formed part of Section 3603-B of the Education laws of the State of New York, but that since April 14, 1954, Section 3603-B has been amended and any reference to Section 3, Chapter 141, Laws of 1954 has been deleted. The landlord maintains that since the Education law has been amended, the Rent Commission is not empowered to adopt any such section as 33(5), sub division (a), as amended June 30, 1954.

The tenants contend that the landlord's protest was not timely.

After careful consideration of the entire evidence of record, the Administrator is of the opinion that the protest

of the landlord should be denied. The Administrator finds that the protest was timely and it will be considered on its merits. The Administrator finds that the Local Rent Administrator properly used the equalized assessed valuation rate of 100% since for the purposes of Section 33(5) of the Regulations the equalization rate for Nassau County remains frozen at 100%.

With regard to the landlord's contention concerning the authority of the Administrator to adopt such regulations, the Administrator has considered the landlord's contention and finds it to be without merit.

Chapter 141 of the laws of 1954 amended the Education law, Highway law, and various other laws, in addition to enacting other substantive laws including the one relating to the use of equalization rates in connection with the net return allowed under the Rent Control Law.

The landlord alleges that the amendment of Section 3603-b of the Education Law by Chapter 339 of the Laws of 1955 has the effect of repealing Section 3, Chapter 141 of the Laws of 1954. Section 3 states:

> "• • • the ratio which the assessed valuation bears to the full valuation shall be computed by using the equalization rate established by the state board of equalization and assessment for use in placing special franchise assessments on assessment rolls completed in 1953."

Section 1 of Chapter 141 of the Laws of 1954 makes provision for the amendment of Section 3603-b of the Education Law. Section 3 of said Chapter 141, does not amend the Education Law but is an independent provision which defines the equalization rate to be used in connection with the Emergency Housing Rent Control Law.

Exhibit B.

Chapter 339 of the Laws of 1955 amends various sections of the Education Law including Section 3603-b and the Highway Law. No reference is made to the Emergency Housing Rent Control Law or to the repeal or amendment of Section 3 of Chapter 141 of the Laws of 1954 and therefore said Section 3 remains in equal effect.

On the basis of the entire record the Administrator finds that the Local Rent Administrator properly found that the landlord failed to qualify for an increase under Section 33(5) as it was earning a net return in excess of 6%.

Therefore, in accordance with the provisions of the Emergency Housing Rent Control Law, as amended, and the Rent and Eviction Regulations promulgated thereunder, it is

ORDERED, that this protest be, and the same hereby is denied, and that the Local Rent Administrator's orders be, and the same hereby are affirmed. ISSUED.

CHARLES ABRAMS
Charles Abrams
State Rent Administrator

I hereby certify that this is a true copy of above issued order.

EDWARD A. DAVIS
Certifying Officer

Exhibit C

STATE OF NEW YORK
TEMPORARY STATE HOUSING RENT COMMISSION
280 Broadway
New York 7, New York

Protest Docket No: PR-101

In the Matter of the Protest of

FOUR MAPLE DRIVE REALTY CORP.,

Applicant.

ORDER AND OPINION DENYING PROTEST

On August 24, 1955, the above-named applicant filed a protest against Section 33(5) of the Rent and Eviction Regulations, which provides:

"Section 33. *Grounds for increase of maximum rent.* • • • Any landlord may file an application to increase the maximum rent otherwise allowable, on forms prescribed by the Administrator, only on one or more of the following grounds:

5. Net annual return.

a. The net rental income from a property yields a net annual return of less than six percent of the valuation of the property, as hereinafter defined. Such valuation shall be the current assessed valuation established by a city or town, which is in effect at the time of the filing of the application for an adjustment under this paragraph, properly adjusted by applying thereto the ratio which such assessed valuation bears to the full valuation as determined by the State

Exhibit C.

Board of Equalization and Assessment for use in placing special franchise assessments on assessment rolls completed in 1953. Where, however, the assessed valuation of the land exceeds four times the assessed valuation of the buildings thereon, the Administrator may determine a valuation of the property equal to five times the equalized assessed valuation of the buildings, for the purpose of this paragraph."

This is a protest against the Regulations, and not against any particular order of the Local Rent Administrator. It is noted that a separate order and opinion was issued by the Administrator on November 3, 1955 under Docket No. PLAO-867, determining the merits of landlord's protest against the orders issued by the Local Rent Administrator of the Hempstead Local Rent Office, which had denied landlord's application for an increase under Section 33(5) of the Regulations. Because the said protest also constituted a protest against the language of Section 33(5) of the Regulations with respect to use of the 1953 equalization rates in computing a 6% return, landlord's said protest was also docketed as a protest against the Regulations, and this question will be separately determined herein.

In substance, the protest claims that:

For the purpose of processing applicant's Section 33(5) proceeding, the Local Rent Administrator used the equalization rates imposed during 1953; use of these rates are prescribed by Section 3 of Chapter 141 of the Laws of 1954; this Section was not specifically re-enacted in the Laws of 1955 and therefore the said Section 3, enacted during the 1954 session of the Legislature, is no longer in effect and the Local Rent Administrator should therefore have used the revised equalization rates of 1954 instead of continuing to use those imposed during 1953.

Exhibit C.

The Administrator has carefully considered the protest herein. The said Section 3 of Chapter 141 of the Laws of 1954 authorizes the use of the 1953 equalization rate in equalizing assessed valuation for the purpose of computing a landlord's 6% return under Section 33(5) of the Rent and Eviction Regulations. The said Section 3 of Chapter 141 of the Laws of 1954, which thus prescribes use of the ratio which such assessed valuation bears to the full valuation as determined by the State Board of Equalization and Assessment for use in placing special franchise assessments on assessment rolls completed in 1953, reads as follows:

> "3. Notwithstanding the provisions of any general, special or local law, for the purposes of subdivision 4 of section 4 of chapter 274 of the laws of 1946, as amended, constituting the emergency housing rent control law, the ratio which the assessed valuation bears to the full valuation shall be computed by using the equalization rate established by the state board of equalization and assessment for use in placing special franchise assessments on assessment rolls completed in 1953."

Applicant's protest claims that this said Section 3 of Chapter 141 of the Laws of 1954 constituted a part of Section 3603B of the Education Law, and when the said Section 3603B was revised in 1955 (Chapter 339), the said Section 3, which specified use of the 1953 equilization rate, was not re-enacted.

However, a careful reading of the several statutes in question discloses that applicant's position is not well taken. The said Chapter 141 of the Laws of 1954 consists of an aggregate of miscellaneous provisions and is not confined to Section 3603-b of the Education Law. The subject Section 3 of the said Chapter 141 was not a part

of Section 3603-b of the Education Law, as applicant has claimed herein, and applicant's contention is predicated upon an apparent misreading of the said chapter, viz:

"*Section 1.* Section 3603-b of the education law, • • • is hereby amended to reads as follows: • • •

3603-b. Temporary provisions relating to apportionments of moneys to school districts.

1. Definitions • • • (etc.)

2. Apportionments based on school year ending June 30, 1948 • • • (etc.)

3. Apportionments based on school year ending June 30, 1955 • • • (etc.)

Section 2. Notwithstanding the provisions of sections 279 and 281 of the highway law, and chapter 824 of the laws of 1950 • • • (etc.)

Section 3. Notwithstanding the provisions of any general special or local law • • • for the purposes of section 4(4) of • • • the emergency housing rent control law • • •

(This is the above-quoted Section 3 which is the subject of this order)

Section 4. Subdivision 3 of section 3501 of the education law • • • is hereby renumbered subdivision 4 and a new subdivision 3 inserted in place thereof to read • • • (etc.)

Section 5. Section 164 of the tax law • • • is hereby amended to read • • • (etc.)

Section 6. Section 49-a of the tax law • • • is hereby amended to read • • • (etc.)

Exhibit C.

Section 7. Section 49-b of the tax law • • • is hereby amended to read • • • (etc.)

Section 8. Section 49-d of the tax law • • • is hereby amended to read • • • (etc.)

Section 9. Section 49-f and section 49-g of the tax law • • • is hereby amended to read • • • (etc.)

Section 10. Paragraph a of section 2701(4) of the education law • • • is hereby amended to read • • • (etc.)

Section 11. The first paragraph of section 2.00(7)(a) of the local finance law • • • is hereby amended to read • • • (etc.)

Section 12. Subdivision 21 of such section • • • is hereby amended to read • • • (etc.)

Section 13. Notwithstanding the provisions of section 2002(1) of the education law • • • (etc.)

Section 14. Section 194(3)(a)(4) of the town law • • • is hereby amended • • • (etc.)

Section 15. Section 61 of the general construction law • • • is hereby amended • • • (etc.)

Section 16. In computations of full valuation • • • (etc.)

Section 17. Nothing contained in this act shall modify • • • section 45 of the tax law • • • (etc.)

Section 18. The equalization rates first established under section 49-a of the tax law • • • (etc.)

Section 19. This act shall take effect • • •" (etc.)

Exhibit C.

Thus, the said Section 3 of Chapter 141 of the Laws of 1954 was not repealed simply because Section 3603-b of the Education Law was revised in 1955 and did not recite the language of the said Section 3 of the 1954 Chapter 141. It is academic that the session laws do not annually re-enact each and every section of the laws, but only specify changes therein. Applicant is not claiming express repeal, but only an indirect repeal by deletion.

Thus, the above abstract of Chapter 141 of the Laws of 1954 shows clearly that the said Section 3 did not in any way amend Section 3603-b of the Education Law in 1954; it was totally independent of Section 3603-b of the Education Law; it was a wholly separate, independent provision of Chapter 141 of the Laws of 1954 defining the equalization rate to be used in connection with the Emergency Housing Rent Control Law; and it is still in full force and effect.

Moreover, the language of the said Section 3 of Chapter 141 at no time appeared as part of Section 3603-b of the Education Law, and its failure now to be in this section represents absolutely no change or deletion. As a matter of fact, the said Section 3 of Chapter 141 of the Laws of 1954 appeared as an unnumbered annotation to Section 8584 of the Unconsolidated Laws (the Emergency Housing Rent Control Law) and it still continues to so appear.

There can be no question that the said Section 3 of Chapter 141 of the Laws of 1954 has not been repealed or amended, directly or indirectly, and it remains in full force and effect. The protested Section 33(5) of the Regulations recites the language of the statute and is in all respects consistent with the statutory authority therefor, and applicant's protest must accordingly be denied.

Exhibit C.

Therefore, in accordance with the provisions of the Emergency Housing Rent Control Law, as amended, and the Rent and Eviction Regulations promulgated thereunder, it is

ORDERED, that this protest be, and the same hereby is, denied.

Issued: Nov. 22, 1955.

CHARLES ABRAMS,
Charles Abrams,
State Rent Administrator.

I hereby certify that this is a true copy of an order issued on the above date.

EDWARD A. DAVIS,
Certifying Officer.

Exhibit D

MEMORANDUM

SUPREME COURT

NASSAU COUNTY

Special Term, Part I
Cal. No. 2371—3/7/56)

By JOHNSON, J.

Dated March 21, 1956

In the Matter of the Application of
FOUR MAPLE DRIVE REALTY CORP.,

Petitioner,

for an order, etc.,

vs.

CHARLES ABRAMS, State Rent Administrator,

Respondent.

This is a proceeding under Article 78, Civil Practice Act, wherein petitioner seeks an increase of maximum rent. The Court finds that this proceeding is timely. Careful consideration has been given to the petitioner's earnest and weighty contentions. However, the Court is not persuaded that Section 3 of Chapter 141 of the Laws of 1954 has been repealed or that its applicability to Chapter 274 of the Laws of 1946, as amended, has been in any manner affected, even by the silence of Chapter 685 of the Laws of 1955 with respect thereto. The argument that this results in a denial of equal protection of the laws is not one that can be considered in this proceeding. It follows that the petition must be dismissed.

Proceed on notice.

.....,

J. S. C.

d1

Exhibit F

2 A. D. 753, 153 N. Y. S. 747

Matter of Four Maple Drive Realty Corp'n, ap (Abrams, res; Kelly, intervenor-res)—On June 9, 1955, the owner of an apartment house filed an application with the Local Rent Administrator at Hempstead, N. Y., for an adjustment of maximum rents pursuant to section 4 (subdiv. 4, par. [a], clause [1]) of the State Residential Rent Law (Laws of 1946, ch. 274, as am'd) hereinafter called the Rent Law. The landlord asserted that it was entitled to a net 6 per cent. return of the assessed valuation of the property, properly adjusted by applying thereto the ratio which such assessed valuation bore to the full valuation as determined by the State Board of Equalization and Assessment. The current ratio established in 1954 by this board for property in the area was 49 per cent. If this 49 per cent. ratio is applicable, appellant will apparently be entitled to very substantial increases in the maximum rents. The local rent administrator held that the rate to be applied was 100 per cent., the rate established in 1953 pursuant to section 33 (subdiv. 5, par. a) of the Rent and Eviction Regulations, which was amended to conform to section 3 of chapter 141 of the Laws of 1954. He held that it was unnecessary to pass on factual issues raised by the tenants since the landlord would be entitled to no adjustment under that regulation and denied the application. The state rent administrator, holding that the protest filed by the landlord was timely and would be considered on the merits, denied the protest and affirmed the orders of the local rent administrator.

In this proceeding pursuant to article 78 of the Civil Practice Act, to review the determination of the State Rent Administrator, the landlord prays for the following relief: (1) annulling the orders of the respondent, (2) directing

him to grant the application for an increase in maximum rents (based on the 49 per cent. rate established in 1954) and for such other and further relief as to the court might seem just and proper. The petition asserted that section 3 of chapter 141 of the Laws of 1954 was unconstitutional. The appeal is from the order dismissing the proceeding.

Order unanimously affirmed, without costs.

Upon this record, the contention of the intervenors-respondents (tenants) that the protest was not timely cannot be sustained (see e.g., Matter of Hutchins v. McGoldrick, 282 App. Div., 945, aff'd 307 N. Y., 78). They contend that appellant did not claim in its protest that section 3 of chapter 141 of the Laws of 1954 was repealed by chapter 685 of the Laws of 1955, which amended and re-enacted the Rent Law, and therefore may not raise such objection now (see e.g., Matter of La Russo v. McGoldrick, 283 App. Div., 720). Upon this record that contention must be overruled (State Residential Rent Law, sec. 9).

In our opinion, section 3 of Chapter 141 of the Laws of 1954 was not repealed by chapter 685 of the Laws of 1955. The 1955 Legislature must have known that a repeal of section 3 of chapter 141 of the Laws of 1954 would have drastic effects upon rents in some areas (1954 New York State Legislative Annual, p. 111). An intentional repeal of that section is not consistent with the statement in the "Declarations and Findings" and with the provision governing the adoption of regulations (Laws of 1955, ch. 685, sec. 1; sec. 4, subdiv. 4, par. [a]). It does not seem logical that the Legislature, by failing to refer to the 1954 statute when it enacted the 1955 Rent Law, which was intended to continue the prevention of abnormal rent increases, inflationary pressures, dislocation and hardship, intended to repeal section 3 of the 1954 statute (2 Sutherland on Statutory Construction [3d ed.], sec. 4702).

If there were doubts on that issue, the doubts would be resolved and removed by a study of the history leading to the enactment of the 1955 statute. The legislative history of the Rent Law since its first enactment in New York, the memorandum of the State Board of Equalization and Assessment recommending the enactment of chapter 141 of the Laws of 1954 (1954 New York State Legislative Annual, p. 111), the governor's message to the Legislature on January 20, 1955 (McKinney's Session Laws of New York, pp. 1580-1582) and the functions of the Temporary State Housing Rent Commission preclude a conclusion that the 1955 Legislature did not know what drastic results would follow a repeal of section 3 of the 1954 statute or that it would impliedly repeal that section without making an unequivocal reference to such appeal.

If appropriate and necessary, consideration could be given to the legislative history in 1955 of the Rent Law prior to its adoption by the Legislature (see e.g., Schwegmann Brothers v. Calvert Distillers Corp'n, 341 U. S., 384, and Woollcott v. Shubert, 217 N. Y., 212). In the search for legislative intent, the court is not required to ignore the governor's message, interpreting and construing the Rent Law, at the time he approved the law (1955 McKinney's Session Laws of New York, pp. 1650-1652) which was of such public and political importance and in which he was actively interested while it was pending in the Legislature. In exercising his power to approve or veto legislation, the governor performs a legislative function (Teeval Co. v. Stern, 301 N. Y., 346, 362).

In our opinion, section 3 of chapter 141 of the Laws of 1954 and the regulation adopted pursuant thereto are valid and constitutional. The mere fact that legislation does not affect all areas uniformly does not render it unconstitutional (Farrington v. Pickney, 1 N. Y., 2d, 74). Instead of defeating, it may furnish the necessary means of giving

that equal protection to all persons which is constitutionally required (Hayes v. Missouri, 120 U. S. 68, 72). Classification is permitted without doing violence to the equal protection of the laws when it is reasonable and based upon some real and substantial distinction, bearing a reasonable and just relation to the matters in respect to which the classification is imposed (Truax v. Corrigan, 257 U. S., 312, 337). Although emergency legislation enacted in the exercise of the state's inherent police power does not have a uniform effect throughout the state, such law is not unconstitutional when the challenged classification is obviously justified (Teeval Co. v. Stern, 301 N. Y., 346, 361, supra; Marcus Brown Co. v. Feldman, 256 U. S., 170).

Respondent argues that the attack on the constitutionality of the statute cannot properly be made here but only in a plenary proceeding.

The Rent Law and the Regulations provide that no order increasing the maximum rent shall be effective prior to the date on which the order therefor is issued (State Residential Rent Law, sec. 4, subdiv. 6; Rent and Eviction Regulations, sec. 32). However, when the state rent administrator grants a protest and overrules an order of the local rent administrator, or the local rent administrator, pursuant to a direction and remand of the court, changes his prior determination, the new order increasing the maximum rent can be made effective as of the date of the first order of the local rent administrator (Levy v. 1165 Park Ave. Corp'n, 305 N. Y., 607; Matter of Macan Estates, Inc., v. McGoldrick, 281 App. Div., 810, aff'd 305 N. Y., 876). If the statute and regulation were unconstitutional, substantial injustice would be inflicted upon a landlord if he were required to obtain a judgment declaring them unconstitutional in an action instituted solely for

that purpose before he would be entitled to an order of the administrator adjusting the maximum rents on a basis that the statute and regulation were unconstitutional. With the issue of unconstitutionality squarely raised in the protest and in the petition, the court may consider this article 78 proceeding as one in the nature of mandamus, or as including a proceeding in such nature, to direct the state rent administrator to disregard an alleged unconstitutional statute regulation and grant the relief to which the petitioner would be entitled if they were unconstitutional (Matter of Newbrand v. City of Yonkers, 285 N. Y., 164, 174; Toscano v. McGoldrick, 300 N. Y., 156, 161-162; see e.g., Matter of Cherry v. Brumbaugh, 255 App. Div., 880).